Editor's note: Request for clarification denied by Order issued June 11, 1996; appeal filed, sub nom. West Virginia Highlands Conservancy, Inc. v. Babbitt and LaRosa Fuel, Inc., Civ. No. 1:96CV34 (N.Dn. W.VA), aff'd, (Sept. 8, 1997), appeal filed, No. 97-2559 (4th Cir. Nov. 7, 1997), vacated and remanded for dismissal, (IBLA decision not ripe for review) Dec. 7, 1998; 161 F.3d 797; order of dismissal (N.D. W.VA May 6, 1999)

LAROSA FUEL CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,
WEST VIRGINIA HIGHLANDS CONSERVANCY,
INTERVENOR

IBLA 94-295 Decided January 30, 1996

Appeal from a decision of Administrative Law Judge David Torbett, sustaining Cessation Order No. 92-112-433-02 and denying temporary and permanent relief. CH 92-5-R, CH 92-5-P.

Vacated and case remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   Where a state has an approved state program and it is acting as the regulatory authority, it has the authority to determine when reclamation under the initial regulatory program has been successfully completed.

2. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

   Under 30 CFR 700.11(d)(2), if OSM desires to challenge the termination of regulatory jurisdiction over an initial program permit which occurred prior to the adoption of 30 CFR 700.11(d) in 1988, OSM must establish, consistent with 30 CFR 700.11(d)(2), that the written determination required by regulation was based on fraud, collusion, or misrepresentation of a material fact.

3. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   In promulgating 30 CFR 700.11(d), OSM established a procedure for reasserting jurisdiction when the state regulatory authority has terminated jurisdiction over a minesite. That procedure requires that OSM notify the state of possible violations (including incomplete reclamation) that it believes exist at the site. If the state declines to reassert jurisdiction under 30 CFR 700.11(d)(2), OSM must determine whether or not the state's decision not to reassert regulatory jurisdiction was arbitrary, capricious, or an abuse of discretion.

4. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

   When the record in a case fails to show that OSM has followed the proper procedures to reassert jurisdiction over a minesite under 30 CFR 700.11(d), after jurisdiction has been terminated by the state regulatory authority, OSM enforcement actions must be considered a nullity.

APPEARANCES: Dean K. Hunt, Esq., Lexington, Kentucky, for LaRosa Fuel Company, Inc.; Wayne A. Babcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; L. Thomas Galloway, Esq., Washington, D.C., and Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for West Virginia Highlands Conservancy.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

LaRosa Fuel Company, Inc. (LaRosa Fuel), has appealed from a December 27, 1993, decision by Administrative Law Judge David Torbett sustaining Cessation Order (CO) No. 92-112-433-02 and denying temporary and permanent relief in Hearings Division Docket Nos. CH 92-5-R and CH 92-5-P. In his decision, Judge Torbett also reviewed the assessed civil penalty of $800 and determined that no penalty should be assessed. This part of his decision has not been challenged by any party.

Procedural Background

On April 2, 1992, the Office of Surface Mining Reclamation and Enforcement (OSM) issued Cessation Order (CO) No. 92-112-433-02 to LaRosa Fuel citing it for a failure to minimize disturbances to the prevailing hydrologic balance and to the quality and quantity of water in surface and ground water systems at its Kittle Flats minesite and associated off-site areas in Randolph County, West Virginia. OSM further stated that LaRosa Fuel's failure to treat water discharges to meet effluent limitations was causing significant, imminent environmental harm to Cassity Fork and other downstream areas. OSM charged that LaRosa Fuel's actions were in violation of sections 515(b)(10) and 521(a)(1)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1265(b)(10) and 1271(a)(1)(2) (1994), and 30 CFR 715.17, 30 CFR 715.17(a), 30 CFR 722.11, 30 CFR 816.41, 30 CFR 816.42, and 30 CFR 843.11. As remedial action, OSM required LaRosa Fuel to immediately install, operate, and maintain adequate treatment facilities to treat "the acid mine drainage [AMD], including seeps and the haul road pond and ponds C-2 and F-2 which enter Cassity Fork and its tributaries in order to meet the effluent limitations as set forth in the NPDES [National Pollution Discharge Elimination System] program and 40 CFR Part 434" (Respondent's Exh. 28). 1/

LaRosa Fuel filed an application for review of, and temporary relief from, the CO on April 4, 1992. The Hearings Division assigned that application Docket No. CH 92-2-R. On April 27, 1992, West Virginia Highlands Conservancy (WVHC) filed a separate application for review of the CO, a motion to consolidate its application with the application filed by LaRosa Fuel, and a petition to intervene as a party in Docket No. CH 92-2-R. In an order dated May 12, 1992, Judge Torbett granted WVHC's petition to intervene and determined that its "separate Application for Review and Motion to Consolidate will be unnecessary" due to its full party status.

On May 20, 1992, LaRosa Fuel filed a petition for review of the proposed $800 civil penalty associated with the CO and a motion to consolidate the proceedings. The Hearings Division assigned the petition Docket No. CH 92-2-P and in an order dated May 28, 1992, Judge Torbett granted the motion to consolidate Docket Nos. CH 92-2-R and CH 92-2-P. Judge Torbett conducted a hearing on the consolidated cases in Morgantown, West Virginia, on September 21, 22, 24, and 25, 1992. Thereafter, he issued the decision which is the subject of this appeal.

1/ Further references in this opinion to the parties' exhibits presented at the hearing shall be to "Exh. R-_," for OSM's exhibits, "Exh. P-_," for LaRosa Fuel's exhibits, and "Exh. I-_," for intervenor, West Virginia Highlands Conservancy's exhibits.

Factual Background

It is important to an understanding of this case to review the history of coal mining at Kittle Flats and State and Federal regulation of that activity.

Kittle Flats is a plateau area. Drainage from it flows into Cassity Fork and Panther Fork, which are upstream from the town of Cassity, West Virginia, and the confluence with the Middle Fork River (Exh. I-1 at 9-10). Mining began on Kittle Flats in 1945 when Three Forks Coal Company commenced operations. It mined until 1949. Cunningham Coal Company mined approximately 85 acres from the 1950's until bond forfeiture in the mid-1960's. Several other companies also conducted coal mining operations at Kittle Flats prior to LaRosa Fuel's operations (Exh. I-1 at 9; Tr. 595-97).

There is no dispute that these activities, which involved little or no reclamation, caused severe AMD problems resulting in significant water quality deterioration in Cassity Fork and downstream in the Middle Fork River. 2/

Beginning in 1973, the State of West Virginia issued four permits to LaRosa Fuel to mine at Kittle Flats, the last of which was permit No. 79-76, which is the subject of the present action (Exh. I-1 at 12). 3/ The initial regulatory program under SMCRA became applicable to LaRosa Fuel's operations on May 3, 1978. LaRosa Fuel completed coal removal in Kittle Flats in 1979 (Exh. I-1 at 12).

LaRosa Fuel's four permits covered a total of approximately 249 acres, 78 acres of which were permitted under permit No. 79-76 (Exhs. P-35, 36, 37, 38). In addition, approximately 109 acres were permitted as a special reclamation project under which LaRosa Fuel regraded and seeded abandoned mine acreage which had been adversely affected by prior mining operations at Kittle Flats (Exh. I-1 at 12; Tr. 433).

2/ At the hearing, Pete Pitsenbarger, Chief of the West Virginia Division of Environmental Protection (WVDEP), Abandoned Mine Lands, testified that in the early 1970's the State undertook some special reclamation on the site to cover the exposed coal and black material and to establish a vegetative cover in the area (Tr. 429-31). At that point the State's concern was revegetation, not water quality (Tr. 431). Other evidence in the record indicates that the State's special reclamation occurred in the late 1960's and that its purpose was to improve water quality (Exh. I-1 at 9, 12). Whatever its purpose, it had little effect on water quality (Exh. I-1 at 12).

3/ Pitsenbarger stated that when LaRosa applied for permits, he "had occasion to look at [the Kittle Flats area] from a water quality standpoint" and he recommended "that we couldn't hurt it, because the water was as bad as anything that I had ever seen" (Tr. 431).

James J. LaRosa testified that in the summer of 1975 when he began working full time at Kittle Flats, the company was utilizing the practice, as required by State regulation and permit, known as "burying the black stuff on the bottom," in which all toxic materials were placed on the pit floor and covered with spoil. 4/ There were no special handling requirements for overburden at that time (Tr. 511-13).

LaRosa stated that about 1977-78 the company realized that the requirement to "bury the black stuff on the bottom" resulted in significant water quality problems and it consulted with a West Virginia University professor and others who recommended that the company discontinue that practice, and instead, lime the pit floors, and selectively place overburden (Tr. 513-15). 5/ LaRosa testified that at that time the company hired an individual, Charles Miller, who was highly recommended by
the university professor, to coordinate the new reclamation activities
and the acid-production problems at Kittle Flats (Tr. 515-17). The company also hired additional personnel whose exclusive responsibility was to work with Miller on reclamation efforts (Tr. 518-19). About the same time, the State created an AMD Task Force composed of operators, state, and university personnel. Two of LaRosa Fuel's employees were part of that task force and LaRosa Fuel helped fund that effort to address the problems of AMD (Tr. 519, 526).

On or about May 3, 1978, the date that SMCRA initial program regulations became effective, LaRosa Fuel had a large pit of coal exposed on permit No. 79-76 (Tr. 523-24). At that time, the company discussed the option of closing the pit without removing the coal. 6/ However, it determined that leaving the coal in place in the pit would cause greater water quality problems than removal (Tr. 524-25; see 634-35).

In a letter to the State, dated December 14, 1979, LaRosa Fuel requested grade release for its four permits at Kittle Flats. In that

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4/ LaRosa's relationship to LaRosa Fuel at the time of the hearing was not identified. Exhibit P-6 is a letter to the State, dated Oct. 6, 1983, signed by James J. LaRosa, President, LaRosa Fuel.

5/ Benjamin Greene, president of the West Virginia Surface Mining and Reclamation Association, testified that while the requirement to "bury the black stuff on the bottom" existed in West Virginia law "clear up into the mid-eighties, late eighties," some operators began changing their practices around 1977 (Tr. 608). In a Dec. 14, 1979, letter to the State, requesting grade release of its bonds for its Kittle Flats permits, LaRosa Fuel explained that it changed its practices in mid-1977 at a time when it had completed 90 percent of its mining at the site (Exh. P-7 at 3).

6/ Had LaRosa Fuel closed the pit without removing the coal, its operations would not have been subject to Federal regulation. See 30 U.S.C. § 1252(c) (1994).

letter, it detailed the premining conditions of the site, including water quality data for 1966 and 1968; compared that data to data taken in 1979; explained that it had exceeded its obligations in each phase of its special reclamation; and stated that its efforts at the site had resulted in an improvement in the water quality in the Middle Fork River (Exh. P-7 at 3).

In a memorandum dated January 10, 1980, Dan Lehmann, a state mine inspector, recommended grade release for the permits, stating "[s]amples collected in December 1979 by the company and verified by my tests indicate an overall improvement in water quality over the 1966 to 1968 test * * * (Exh. P-8).

On January 17, 1980, OSM issued a notice of violation (NOV) No. 80-1-58-3 to LaRosa Fuel for a failure to meet effluent limitations for pH and total iron at two sample sites on permit No. 79-76 (Exh. P-49). On February 19, 1980, OSM issued the company a follow-up failure to abate CO No. 80-1-58-3 (Exh. P-52). LaRosa Fuel filed applications for review of and temporary relief from both the NOV and the CO. The Hearings Division assigned those applications Docket No. CH-0-171-R.

LaRosa testified that, upon receipt of the NOV, "[w]e were stunned because we had met the criteria that we felt that we had to meet at that point in time" (Tr. 530). At the time OSM cited the company with the violation, LaRosa Fuel was commingling water from its mined areas with water from the special reclamation areas because the State had required it to do so as part of its special reclamation agreement (Tr. 531-32).

The confusion existing at that time resulted from a dispute between the State and OSM over what water quality criteria should apply to discharges from premined areas. Under State policy in 1979, an operator could obtain a grade release if water quality were "equal to or better than" premining quality and, if that standard were met, the operator was no longer required to treat discharges (Tr. 465, 478, 581). OSM, however, took the position that the operator was required to continue to treat discharges to effluent limitations after grade release. 7/

The record shows that following issuance of the NOV, representatives of LaRosa, OSM, and the State met on site to discuss the situation and the State/Federal conflict was aired, but not resolved (Exhs. P-54 and 55). David Agnor, the OSM inspector who issued the NOV and CO, testified that

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7/ The State revised that policy in March 1980 to require water treatment up to the time of final grade release, but the same standard applied--"equal to or better than" premining quality for sites with prior water problems (Tr. 394-95, 467, 479). The State applied that policy through 1985 (Tr. 470-71; see Tr. 393-94). Upon final bond release, the responsibility of the operator ended (Tr. 465).

"we advised LaRosa that they were responsible for the water discharges from areas that were mined after May 3, 1978, and if they could segregate that specific water, that was the drainage that they were responsible for the effluent limitations" (Tr. 583). OSM confirmed that position in a letter to LaRosa Fuel, dated March 12, 1980 (Exh. P-57).

LaRosa testified that in an attempt to comply with OSM's instructions, LaRosa Fuel constructed ditches to direct surface water from permit No. 79-76 into the sedimentation ponds and allow other water to flow naturally downhill into Cassity Fork. In addition, he stated that the company diverted seeps arising in areas mined prior to 1973 away from its ponds (Tr. 533-36). LaRosa testified that as a result of the company's work, waters were effectively segregated (Tr. 540). Although Agnor stated at the hearing that he did not observe any ditch lines in 1980 that would have segregated water from permit No. 79-76 (Tr. 591-92), he, nevertheless, terminated the NOV and CO on March 10, 1980, noting that "effluent limits are being met this date" (Exh. P-53 at 3 and 4). 8/

In a letter dated July 28, 1981, LaRosa Fuel requested that the State grant it a final bond release for its four permits on the Kittle Flats area, stating that it had "just recently completed the backfilling and reclamation work on the ponds as per our agreement dated July 21, 1980." The company also noted that it had "honored our pond elimination commitment" and that its vegetation establishment period had expired (Exh. P-23; see also Tr. 374-75, 390-91).

More than 2 years later, in a letter dated September 26, 1983, the Director, West Virginia Department of Natural Resources (DNR), responded by informing LaRosa Fuel that its Kittle Flats operations "continue to exhibit serious environmental problems," and that "[a]nalyses conducted over the past five years have revealed a disastrous deterioration in water quality to the point where it is now below the water quality which was present prior to the commencement of your operations in this area" (Exh. P-26). 9/ The State acknowledged that it had approved the elimination of ponds, the stoppage of water treatment, and grade release. It explained, however, that each approval was predicated on information that post-mining water quality was better than or equal to premining quality at that time. Id. It denied bond release and directed LaRosa Fuel to reinstitute treatment measures at the site.

LaRosa Fuel responded to the letter from the State by letter dated October 6, 1983, explaining that it had retained Sturm Environmental

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8/ In a decision in Docket No. CH-0-171-R, dated Oct. 20, 1983, Acting Chief Administrative Law Judge Joseph E. McGuire upheld the issuance of NOV No. 80-1-53-3 and CO No. 80-I-58-3 (Exh. R-28).

9/ At that time, DNR was the State regulatory authority. That function was later transferred to the State's Department of Energy and, thereafter, to the DEP.

Services (SES) "to study and assess the Kittle Flats water quality, pre-existing and current" and noting that John Sturm of SES had been personally familiar with the Kittle Flats area since the early 1970's (Exh. P-27; see Tr. 540-541, 552).

In a letter dated October 26, 1983, counsel for LaRosa Fuel requested that the Director, DNR, modify his letter and grant the company temporary relief from the requirement to reestablish treatment. Counsel explained that a report from SES established that the post-mining water quality was, in fact, better than premining water quality (Exh. P-29). LaRosa Fuel also filed a notice of appeal of the September 26, 1983, letter with the State Reclamation Board of Review (Exh. P-31). On November 10, 1983, the Director, DNR, granted LaRosa Fuel temporary relief pending the outcome of the proceeding before the Reclamation Board of Review (Exh. P-33).

On July 6, 1984, LaRosa Fuel and the State reached a settlement agreement (Exh. P-34). John C. Ailes, Jr., the Acting Chief of the Office of Mining Reclamation, DEP, at the time of the hearing, and in 1984, DNR's Assistant Chief of Inspection and Enforcement, testified that although the State's inspection staff felt that post-mining water quality at Kittle Flats had deteriorated (Tr. 496-98), counsel for the State was concerned about the State's ability to win the case and advised a settlement (Tr. 487-89).

Under the terms of the settlement agreement, LaRosa Fuel agreed to pay a total of $115,000 in 4 installments over a period of 18 months into an escrow account administered by the Director, DNR, for reclamation of Kittle Flats, including the funding of a feasibility analysis for improving water quality (Exh. P-34; Exh. I-1 at 13). LaRosa Fuel's bonds were deemed eligible for release at the time of execution of the settlement and they were to be released "contemporaneously with or immediately after execution" of the agreement (Exh. P-34 at 3). Finally, the agreement stated that as of the date of the agreement, LaRosa Fuel "shall have no further liability or responsibility" for the Kittle Flats area. Id. LaRosa Fuel obtained final bond release from the State on permit No. 79-76 on July 30, 1984 (Exh. P-35). At that time, the company lost the legal right of access to those areas under the permit.

In August 1984, OSM conducted an inspection of permit No. 98-74, one of LaRosa Fuel's four Kittle Flats permits. The inspection report, dated August 28, 1984, noted that the permit covered 21 acres. Therein, the inspector stated:

> The oversight inspection on 8-28-84 revealed all disturbed areas over the entire 248.22 acres have been returned to A.O.C. [approximate original contour] and revegetated. Vegetation is fair but some barren areas exist. The main problem on the site is water pollution. Mine acid drainage is seeping from all

> reclaimed areas and is flowing untreated off the site. According to reports in the file, this condition existed prior to mining by La-Rosa Fuel Company. While on the site I met Sam McClung, Elkins, DNR reclamation supervisor. He informed me
> that the entire 248.22 acres which includes permit 98-74 has
> been final released and all bond returned to La-Rosa Fuel Company. This was done by the West Virginia Surface Mine Board of review. The West Virginia DNR reclamation task force is in the progress [sic] of doing a feasibility study on the area to try and control the acid drainage problem.

(Exh. P-58 at 3).

Following a Federal inspection of permit No. 79-76, the same OSM inspector issued a 10-day notice to the State on November 1, 1985, alleging that LaRosa Fuel "[f]ailed to maintain effluent limitations as set forth in the NPDES program." The State responded on November 8, 1985, stating that, since final bond release, it had had no jurisdiction over the site (Exh. P-60). In further explanation, the State reported to OSM in a letter dated November 19, 1985, that

> an Abandoned Mine Lands Program Feasibility Study has been in the progress [sic] to assess the surface and groundwater hydrology on the pre-LaRosa mined areas as well as the entire "Flat." A preliminary report was submitted in August 1985. This is currently being refined as additional data is collected (Exh. P-61).

Although OSM considered the State's response to be "inappropriate," it, nevertheless, informed the State on December 23, 1985, that "[n]o enforcement action taken due to inappropriate release of operator liability per DNR/LaRosa agreement of 8/8/84. No Federal action will be initiated since the State has assumed liability for the site and is pursuing action to correct the violation" (Exh. P-63; see Exh. P-62).

On February 6, 1990, OSM inspected the permit areas for LaRosa Fuel's permit Nos. 98-74 and 79-76 at Kittle Flats. The Mine Site Evaluation Inspection Report, prepared on March 2, 1990, by the OSM inspector, recounted the history of LaRosa Fuel's mining at Kittle Flats, provided listings of water quality data for 1979, 1982, and 1990, all showing pH levels well below six, and noted the 1985 inspection and its results (Exh. R-1). The last paragraph of the report stated:

> The Department of Energy, special reclamation[,] has awarded a contract with Sturm Environmental Services to study the water situation on Kittle Flats and make recommendations on how to handle the water. Crews were surveying the site during this inspection. The contract expires on April 1, 1990.

(Exh. R-1 at 5). The inspection report contained no discussion of any enforcement action contemplated as a result of the inspection.

By letter dated December 27, 1991, WVHC filed a citizen complaint with OSM charging that OSM was required to issue a CO for significant, imminent environmental harm because LaRosa Fuel's four permit areas were in gross violation of the provisions of the initial regulatory program, most notably, 30 CFR 715.17 (Exh. R-4). In a Mine Site Evaluation Inspection Report, prepared by OSM inspector William Berthy on February 2, 1992, he stated that on January 2, 1992, OSM provided the State with a copy of the complaint; that State and OSM officials met on January 3, 1992, to discuss the complaint, and that "WVDEP Director Callaghan deferred to OSM" (Exh. R-5 at 4; see Tr. 44).

On January 8, 1992, OSM personnel, accompanied by two citizens, and an attorney for WVHC, conducted an inspection of the four LaRosa Fuel permit areas, collecting water samples from various sites. Id. In the following months, OSM continued its investigation and inspection, enlisting the services of technical personnel with its Eastern Service Center, and meeting with its counsel and counsel for WVHC (Exhs. R-6, 7, 8, 9, 10). On April 2, 1992, OSM visited LaRosa Fuel's office in Clarksburg, West Virginia, and issued the CO in question (Exh. R-10). There is no indication that OSM contacted LaRosa Fuel at any time prior to April 2, 1992, to inform it about the complaint or investigation.

Judge Torbett's Decision

Judge Torbett's decision contains a detailed 36-page summary of the evidence presented at the hearing and a description of the issues. The first issue he identified was whether OSM could properly exercise jurisdiction over LaRosa Fuel's post-May 3, 1978, mining operation at Kittle Flats. The second was, if OSM had jurisdiction, whether the CO was proper.

Judge Torbett concluded that OSM had jurisdiction in this case. That conclusion was based on his finding that the 1984 settlement agreement between LaRosa Fuel and the State was not binding on OSM, although the agreement "included a finding" that LaRosa Fuel had complied with all provisions of State law, Judge Torbett stated that such finding "was not made because the Petitioner had, in fact, met the requirements of state law, but was issued because the State feared the risk of losing its litigation with Petitioner" (Decision at 41). 10/ He noted that such fear was apparently based on the "possibility that discharges from the site as a whole were equal to or better than the premined site." Id. The Judge stated that

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10/ Although Judge Torbett stated that the agreement "included" the finding, the finding was not included in the settlement agreement (Exh. P-34), but was actually part of the State's form entitled "Release of Reclamation Surety Bond" (Exh. P-35 at 2).

> OSM has never accepted a test permitting toxic discharges from a site if they 'as a whole were equal to or better than premining' discharges. Further, OSM has not approved that rule as part of the State of West Virginia program. Therefore a settlement based on the above purported rule is not acceptable.

Id.

In reference to 30 CFR 700.11(d)(2), Judge Torbett found that LaRosa Fuel and the State committed no fraud or misrepresentation in entering into the agreement, but that it was "not necessary to prove fraud where a pro forma as opposed to an actual finding, is made. There exists no true finding which OSM must overcome." Id. 11/

Judge Torbett also concluded that OSM properly issued the CO. Citing this Board's holding in National Mines Corp. v. OSM, 104 IBLA 331 (1988), that an operator charged with a violation of the effluent standards may escape liability where it can establish that the violation relates solely to drainage from areas not disturbed by the operator, Judge Torbett stated that "[p]etitioner does not persuade the undersigned that its mining operation on area 79-76 did not contribute to the violation of effluent [l]imitation[s] and that other disturbances were the sole cause of the problem" (Decision at 42).

Discussion

Although LaRosa Fuel alleges numerous errors in Judge Torbett's decision, we will first address the question whether OSM had jurisdiction to issue the CO in question in 1992. Judge Torbett concluded that it did. LaRosa Fuel challenges that ruling on appeal. Both OSM and WVHC support Judge Torbett's conclusion.

In examining this question, we turn to 30 CFR 700.11(d)(1)(i), which provides that a regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal

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11/ 30 CFR 700.11(d) provides:

"(d)(1) A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

"(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed;

* * * * * * *

"(2) Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph (d)(1) of this section was based on fraud, collusion, or misrepresentation of fact."

mining and reclamation operation when the regulatory authority determines in writing that, under the initial program, all requirements imposed under subchapter B of 30 CFR have been successfully completed (see note 11, supra).

[1] In the preamble to the proposed rulemaking for 30 CFR 700.11(d), OSM stated that the purpose of amending its regulations was

> to specify when regulatory jurisdiction terminates under the Surface Mining Control and Reclamation Act of 1977 (the Act) for surface coal mining and reclamation operations and coal exploration operations. The lack of a definite standard has led to confusion and uncertainty for [OSM], the State regulatory authorities, coal operators, and the public. This proposed rule would establish a point at which regulatory jurisdiction ends under the Act for both State regulatory authorities and for [OSM], whether it is the regulatory authority or in its oversight capacity.

52 FR 24092 (June 26, 1987).

In its final rule governing the termination of regulatory jurisdiction under SMCRA, published on November 2, 1988, OSM acknowledged that while no specific provision of SMCRA provided for termination, eventual termination of jurisdiction was inherent in the Act. See 53 FR 44356-63. It also noted that:

> States have accepted the responsibility for regulating initial program operations under the State programs. This regulatory responsibility delegated to the State includes not only inspection and enforcement authority but also the authority to determine when reclamation under the initial regulatory program has been successfully completed.

53 FR 44359-60 (Nov. 2, 1988).

The final rulemaking also added a new paragraph (d)(2) based on concerns that states might improperly release final bonds and terminate their jurisdiction over sites that had not been fully reclaimed. OSM explained that the purpose of (d)(2) was to "

> make explicit the effect of the final rule and to codify the preamble discussion to the proposed rule explaining what circumstances would warrant requiring a State regulatory authority to reassert jurisdiction over a site as a 'surface coal mining and reclamation operation' following an earlier termination of jurisdiction." 53 FR 44362 (Nov. 2, 1988).

Specifically responding to an OSM argument urging only the prospective applicability of this regulation, we found in Appolo Fuels, Inc. v. OSM, 125 IBLA 369, 100 I.D. 63 (1993), which contains an extensive discussion

of the rationale behind the promulgation of 30 CFR 700.11(d), that there was nothing in the language of the regulation or its regulatory history evincing an intent to make 30 CFR 700.11(d)(2) purely prospective. On the contrary, we concluded that, for initial program operations, where a state bond had been required and released, OSM would presume, absent clear and convincing evidence to the contrary, that all requirements of SMCRA were met upon final bond release, and would not challenge past state actions so long as they were not inconsistent with the approved program. Id. at 386, 388, 100 I.D. at 72-73; 52 FR 24094 (June 26, 1987).

In that case, the State had released bond on 37 acres of the operator's 39-acre permit area, having found that the operator had met the standard of 30 CFR 700.11(d) based on evidence that the site had been reclaimed to initial performance standards in 1980. The Board ruled that OSM was without jurisdiction over the site in 1989 when an OSM inspector observed a landslide in a backfill area and issued an NOV. Id. at 380, 100 I.D. at 69.

[2] The Board concluded that if OSM desired to challenge the termination of regulatory jurisdiction over an initial program permit which occurred prior to the adoption of 30 CFR 700.11(d) in 1988, OSM was required to establish, consistent with 30 CFR 700.11(d)(2), that the written determination was based on fraud, collusion, or misrepresentation of a material fact. Id. at 389, 100 I.D. at 73-74.

[3] The Appolo Fuels case arose in Tennessee and involved OSM enforcement action at the time that OSM had taken over enforcement of the State program and was, for purposes of the Act, the regulatory authority in the State. See Appolo Fuels, Inc. v. OSM, 125 IBLA at 371, n.2, 100 I.D. at 64, n. 2. As a result, the Board had no occasion to discuss certain final rulemaking preamble language which is more directly applicable to this case. That language is:

> If the regulatory authority has terminated jurisdiction at sites where [OSM] has reason to believe that reclamation was not complete at the time of such termination, whether by bond release or other means, under the rule [OSM] will notify the State of possible violations (including incomplete reclamation) it believes exist at the site. Should the State decline to reassert jurisdiction under § 700.11(d)(2), [OSM] will determine whether or not the State's decision not to reassert regulatory jurisdiction was arbitrary, capricious, or an abuse of discretion under the approved State program.

53 FR 44362 (Nov. 2, 1988). The importance of this language is that it delineates the process by which OSM may reinvolve itself with a former minesite which would otherwise be outside its jurisdiction because it is

no longer a surface coal mining and reclamation operation. 12/ Thus, where OSM has reason to believe that reclamation was not complete at the time of termination, it is required to notify the State regulatory authority of possible violations and allow the regulatory authority an opportunity to respond. If the response is that it will not reassert jurisdiction, OSM must determine whether that response is arbitrary, capricious, or an abuse of discretion. 13/

In the preamble to the Nov. 2, 1988, rulemaking, OSM had earlier stated at 53 FR 44359-60:

> [OSM] was required to implement an initial Federal enforcement program in each State. The initial program was to remain in effect in each State until the Secretary approved a permanent State program or promulgated a Federal program for the State. Upon the approval of a State program, section 503 [30 U.S.C. § 1253 (1994)] of the Act grants the State exclusive jurisdiction for the regulation of surface coal mining and reclamation operations on lands within such State, except for Secretarial responsibilities under sections 521 [30 U.S.C. § 1271 (1994)] and 523 [30 U.S.C. § 1273 (1994)]. In addition to responsibility for permanent program operations, States have accepted the responsibility for regulating initial program operations under the State programs. This regulatory responsibility delegated to the State includes not only inspection and enforcement authority but also the authority to determine when reclamation under the initial regulatory program has been successfully completed.

In this case, the State released bonds for four of LaRosa Fuel's permits in 1984, including permit No. 79-76. Each release, signed by the Director, DNR, contained the language that LaRosa Fuel "had fully complied with the provisions of the Code of West Virginia * * * and the rules and regulations promulgated and adopted pursuant to the sections of the Code of

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12/ As OSM stated in the preamble to the proposed regulation, "jurisdiction under the Act must end simultaneously for State regulatory authorities and [OSM] because once the Act's reclamation requirements are completed at a site, it no longer is a surface coal mining and reclamation operation." 52 FR 24093 (June 26, 1987).

13/ Clearly, such a determination should be in writing and provide the basis for the conclusion. It might also be subject to informal review (cf. 30 CFR 842.11(b)(3)(iii)(A). State regulatory authority may request informal review of OSM written determination that the State failed to take appropriate action to cause a violation to be corrected or to show good cause for such failure) and/or objective administrative review. 43 CFR 4.1280.

West Virginia * * *" (Exhs. P-35, 36, 37, 38). 14/ At the time of release, the State had an approved State program, which was effective on January 21, 1981, with DNR designated as the regulatory authority. See 30 CFR 948.10.

OSM and LaRosa Fuel agree that in 1984 the State regulatory provision regarding water quality standards applicable for release of a permit on an initial regulatory program minesite, cited as West Virginia Surface Mining Regulations § 20-6-4I.03 (1984), provided that bond could be released if "the quality of untreated water discharge is equal to or better than the premining water quality discharged from the mine site" (OSM Brief at 40; LaRosa Fuel Brief at 57-59).

Accordingly, at the time DNR released LaRosa Fuel's bonds in 1984, it had the regulatory responsibility to determine when the reclamation under the initial regulatory program had been successfully completed. Although Judge Torbett found that 30 CFR 700.11(d)(1) did not come into play in this case, because the written finding by the State in its bond release was not a "true finding" of compliance with the law, the record shows that the State made an actual finding in this case. It was incorporated in the bond release form utilized by the State in releasing the bond for permit No. 79-76 (Exh. P-35 at 2). The fact that release was obtained as part of a settlement agreement between the State and LaRosa Fuel does not mean that the State's finding was "pro forma" or not a "true finding."

We now turn to the question of what effect the State's written finding and bond release had on OSM's jurisdiction.

From 1984 to November 1988, the State's written finding and bond release had no effect on OSM's jurisdiction because OSM possessed independent enforcement jurisdiction over initial program sites and a State bond release had no effect on its jurisdiction. See OSM Brief at 42; OSM v. Calvert & Marsh Coal Co., Inc., 95 IBLA 182, 189 (1987); Grafton Coal Co., 3 IBSMA 175, 181 (1981). Nevertheless, the present record contains no evidence of any enforcement action taken by OSM against LaRosa Fuel's Kittle Flats permits during that time period, despite a number of oversight inspections. In fact, following an inspection of Kittle Flats in 1985 and issuance of a 10-day notice to the State citing a failure to meet effluent limitations, OSM expressly declined to take any action "since [the] State

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14/ In the preamble to the final rulemaking, OSM stated that the written determination required by 30 CFR 700.11(d)(1) "could take the form of an approved bond release application or other document that the State regulatory authority uses to accompany final bond release, provided that document relied upon meets the requirement of paragraph (d)(1)(i) for a written determination of compliance with the initial program standards." 53 FR 44359 (Nov. 2, 1988).

has assumed liability for the site and is pursuing action to correct the violation" (Exh. P-63; see Tr. 39-40). 15/

Both OSM and WVHC argue that the 1988 rulemaking did not change the policy as expressed in the Calvert & Marsh case that only successful completion of reclamation according to Federal initial regulatory program standards could terminate OSM's jurisdiction and that OSM never lost jurisdiction in this case because the site in question was not reclaimed to initial program standards at the time of bond release.

However, if, as argued by OSM and WVHC, OSM never lost jurisdiction because a particular site allegedly had not been reclaimed, there would never be a need for a procedure for reassertion of jurisdiction as outlined in the 1988 rulemaking; OSM could, in its oversight role, bring enforcement actions against operators at any time, even after final bond release, just as before the rulemaking. Such a position is inconsistent with the purpose the rulemaking which sought to eliminate the confusion, disagreements, and second-guessing that had developed because there was not an established point at which regulatory jurisdiction ended under the Act for both the State regulatory authority and for OSM. See 53 FR 44356 (Nov. 2, 1988); 52 FR 24092 (June 26, 1987). 16/

15/ The preamble to the Nov. 2, 1988, final rulemaking states:

"[OSM], in its oversight capacity, has conducted some oversight inspections after the State has released the final bond. When notified that [OSM] has reason to believe violations may exist at bond release sites, the State regulatory authorities normally have declined to take any action because they contend that, under State law, enforcement authority has terminated with final bond release. As a result, [OSM] has sometimes taken Federal enforcement actions at such sites.

"Because Federal inspections and resultant enforcement actions have sometimes occurred long after a State released the final bond, factual issues are raised as to whether the condition existed at the time of final bond release, arose subsequently, or was the result of actions or inactions of the operator. Also, the issue of whether or not a particular condition constitutes a violation or whether its acceptance was within the discretion of the regulatory authority is sometimes disputed. These [OSM] enforcement actions occasionally have resulted in disagreements between [OSM] and the States and between [OSM] and operators."

53 FR 44356 (Nov. 2, 1988). In this case, it appears that OSM was deferring to the State's assumption of liability for Kittle Flats. The record shows that, prior to the hearing, the State had taken a number of actions over the years to address the AMD problems at Kittle Flats (Exhs. I-1, R-1 at 5, P-45, P-46, P-61).

16/ We recognize that in Pittsburg & Midway Coal Co. v. OSM, 132 IBLA 59, 72 (1995), we recently emphasized OSM's oversight enforcement role in states with approved state programs. However, that case did not involve any questions concerning termination of jurisdiction by the regulatory authority under 30 CFR 700.11(d).

In order to give effect to all provisions of 30 CFR 700.11(d), we must conclude in this case that the State's written finding in its bond release terminated the jurisdiction of both the State regulatory authority and OSM in its oversight role. Thus, whether or not OSM agreed with that determination, it is binding until jurisdiction is properly reasserted.

[4] Our next question is whether OSM properly reasserted jurisdiction. In the preamble to the November 2, 1988, rulemaking, OSM explained the procedure for reasserting its jurisdiction where it had reason to believe that reclamation was not complete at the time of termination. The record in this case shows that OSM had reason to believe that reclamation was not complete, but it fails to show that OSM followed that procedure in this case.

Here, OSM received a citizen complaint in December 1991 alleging effluent violations at Kittle Flats. The only evidence of any jurisdiction reassertion procedures followed by OSM regarding notification of the State and State response is found in OSM inspector Berthy's February 2, 1992, Mine Site Evaluation Inspection Report, in which he stated that the State had been given a copy of the citizen complaint on January 2, 1992, and that following a meeting of State and OSM officials on January 3, 1992, to discuss the complaint, "WVDEP Director Callaghan deferred to OSM" (Exh. R-5 at 4; see Tr. 44). The record contains no evidence of what the State's position was at that January 3, 1992, meeting. However, since OSM represents that the State "deferred" to it, we will assume, for purposes of continuing our analysis, that deferring to OSM equated to declining to reassert jurisdiction under 30 CFR 700.11(d)(2).

According to 30 CFR 700.11(d)(2), the regulatory authority is required to reassert jurisdiction over a site where it is demonstrated that the written determination referred to in 30 CFR 700.11(d)(1)(i) "was based on fraud, collusion, or misrepresentation of a material fact." 17/ By declining to reassert jurisdiction, a State regulatory authority, either

17/ In National Wildlife Federation v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991), the court, in upholding this regulation, quoted with approval from the Brief of the Secretary at 27 n.11: "If an operator applies for release but has not fulfilled his [reclamation] obligations, he is guilty of misrepresentation by the very fact of making an application." Both OSM and WVHC argue that LaRosa Fuel had not fulfilled its obligations and that by applying for release it was guilty of misrepresentation (OSM Brief at 46; WVHC Brief at 20). Thus, they take a position different from Judge Torbett because he found in his decision that "[t]he Petitioner and the State, of course, committed no fraud in the issuance of the finding that Petitioner had complied with the provisions of the law. There was no misrepresentation of fact or other act which constitutes fraud" (Decision at 41). LaRosa Fuel asserts that it met the applicable requirements for bond release in 1984 (LaRosa Fuel Brief at 56-62).

explicitly or implicitly, makes a finding that its written determination was not based on fraud, collusion, or misrepresentation of a material fact.

Under the reassertion procedure, if the State declines to reassert jurisdiction following notice from OSM, OSM is required to determine whether that action by the State was "arbitrary, capricious, or an abuse of discretion." 53 FR 44362 (Nov. 2, 1988). There is no evidence that OSM made such a finding in this case. Absent such a finding, there is no basis for OSM to reassert jurisdiction over a particular minesite because it is not a surface coal mining and reclamation operation.

Moreover, when OSM does make a finding that a State's determination not to reassert jurisdiction was arbitrary, capricious or an abuse of discretion, that finding must be based on OSM's factual finding that the written determination "was based on fraud, collusion or misrepresentation of a material fact."

Accordingly, the enforcement action by OSM in this case must be considered a nullity and vacated because the record fails to show that OSM had jurisdiction over permit No. 79-76 at the time of the issuance of the CO. 18/ Since OSM had no jurisdiction to issue the CO in this case, we vacate Judge Torbett's decision and remand the case to OSM.

The purpose of the reassertion procedure is to allow OSM and the State to resolve differences before reinvolving the operator. In not following that procedure, OSM perpetuates the exact conditions it purportedly sought to eliminate through the establishment of a point at which regulatory jurisdiction ends--confusion and conflict.

Resolution of the present appeal on the basis of this threshold issue of jurisdiction renders moot the numerous other issues raised by the parties. Any ruling by the Board on those issues at this juncture would constitute an advisory opinion. 19/ As we have stated, the Board does not render advisory opinions on moot questions. Oregon Cedar Products Co., 119 IBLA 89, 92 (1991).

18/ The regulations provide at 30 CFR 843.11(a)(1) that OSM "shall immediately order a cessation of surface coal mining and reclamation operations, or the relevant portion thereof," if certain conditions, practices, or violations exist. (Emphasis added.) Where jurisdiction has terminated, a minesite is no longer considered a surface coal mining and reclamation operation.

19/ This includes LaRosa Fuel's argument, presented to Judge Torbett, but unaddressed in his decision, and reasserted before the Board, that an analysis of OSM and Environmental Protection Agency (EPA) rulemaking, as well as applicable judicial decisions, dictates that the effluent limitations applicable to LaRosa Fuel's permit No. 79-76 are limited by and to the standards adopted by EPA and that examination of EPA regulations shows no violation of those regulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated, the CO is vacated, and the case is remanded to OSM.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I cannot agree that the Office of Surface Mining Reclamation and Enforcement (OSM) did not have jurisdiction to issue its 1992 cessation order to LaRosa Fuel Company (LaRosa Fuel).

West Virginia's July 30, 1984, Release of Reclamation Surety Bond form (Exh. P-35 at 2) states that LaRosa Fuel had "fully complied with the provisions of the Code of West Virginia * * * and the rules and regulations promulgated and adopted pursuant to the sections of the Code of West Virginia * * * (emphasis supplied)."

What the termination-of-jurisdiction regulation, 30 CFR 700.11(d)(1)(i), calls for, however, is that the regulatory authority determine in writing that "under the initial program, all requirements imposed under Subchapter B of this chapter have been successfully completed (emphasis added)." In this case, compliance with West Virginia laws and regulations was not equivalent to compliance with the requirements imposed under 30 CFR, Chapter VII, Subchapter B.

I can find nothing in the record in which West Virginia determines in writing that LaRosa Fuel successfully completed all requirements imposed under Subchapter B -- e.g., by 30 CFR 715.17 and 715.17(a), which are cited in the cessation order. Without such a determination, OSM's jurisdiction over LaRosa Fuel continued despite West Virginia's 1984 bond release and its accompanying statement, and continues to this day.

The preamble to the termination-of-jurisdiction regulation states that 30 CFR 700.11(d)(1)(i)

> provides that a regulatory authority may terminate its jurisdiction * * * over reclaimed sites of initial program surface coal mining operations, if the regulatory authority determines in writing that all requirements imposed under 30 CFR Chapter VII, Subchapter B (the initial program regulations) have, in fact, been successfully completed. [Emphasis added.]

53 FR 44356, 44359 (Nov. 2, 1988). The preamble explains that if a state required a performance bond for an initial program operation (even though one was not required by the Surface Mining Control and Reclamation Act),

> the written determination required by this rule could take the form of an approved bond release application or other document that the State regulatory authority uses to accompany final bond release, provided that the document relie

requirement of paragraph (d)(1)(i) for a written determination of compliance with the initial program standards. [Emphasis added.]

Id. "[W]here bond release does not include the written determination required by paragraph (d)(1)(i), the State regulatory authority must make such a determination for regulatory jurisdiction to terminate." Id. West Virginia did not make such a determination.

The preamble makes clear the regulation was intended to be consistent with our decisions holding that discharge of a state performance bond does not deprive OSM of jurisdiction to take enforcement actions to achieve compliance with initial program requirements. Grafton Coal Co., 3 IBSMA 175, 180-81, 88 I.D. 613, 616 (1981); Bannock Coal Co. v. OSM, 93 IBLA 225 (1986). The preamble states that the rule "is not written in the context of initial program bond release, but instead requires a written determination that the initial program reclamation requirements have been satisfied." 53 FR 44360 (Nov. 2, 1988).

The preamble to the rule also comments that "[s]tates have accepted the responsibility for regulating initial program operations under the State programs," 53 FR at 44359 (Nov. 2, 1988), and that "[t]his regulatory responsibility delegated to the State includes * * * the authority
to determine when reclamation under the initial regulatory program has been successfully completed." 53 FR 44359-60 (Nov. 2, 1988). However, in this case West Virginia did not make that determination. It determined only that LaRosa Fuel had complied with the requirements of West Virginia law.

If West Virginia's July 30, 1984, Release of Reclamation Surety Bond form statement is construed -- I would say misconstrued -- as a written determination that all requirements under 30 CFR Subchapter B have been successfully completed, then the record in this case contains clear and convincing evidence that was not in fact the situation. The Secretary assured the U.S. Court of Appeals for the District of Columbia Circuit that under these circumstances

> the filing of an application for bond release is in itself a representation that the operator has satisfied his reclamation obligations since an operator is not entitled to release from the bond unless he has met those obligations * * *. If an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application.

National Wildlife Federation v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991), quoting Brief for the Secretary at 27 n.11. The U.S. Court of Appeals stated:

> This is a reasonable way of implementing the Act's condition "[t]hat no bond shall be fully released until all reclamation requirements of this chapter are fully met." 30 U.S.C. § 1269(c)(3). The condition implies that after reclamation

> requirements are met, the bond may be "fully released." Id. When it turns out that the operator had in fact not fulfilled its reclamation obligations at the time of release, the Secretary's interpretation of 'misrepresentation' ensures that jurisdiction 'shall' be reasserted. 30 C.F.R. § 700.11(d)(2). [Emphasis in original.]

National Wildlife Federation v. Lujan, supra at 770. See Appolo Fuels, Inc. v. OSM, 125 IBLA 369, 389 n.5, 100 I.D. 63, 74 n.5 (1993).

The preamble to 30 CFR 700.11(d)(2) states that "a regulatory authority will be required to reassert jurisdiction under § 700.11(d)(2) if it can be shown that the bond release was based upon fraud, collusion, or any other misrepresentation of a material fact at the time of bond release (emphasis added)." 53 FR 44358 (Nov. 2, 1988). The preamble also says OSM will determine whether or not a state's decision not to reassert jurisdiction was arbitrary, capricious or an abuse of discretion. 53 FR 44359, 44362 (Nov. 2, 1988). But neither the preamble, nor, more importantly, the regulation, calls for a written determination or finding.

If it is concluded that West Virginia properly terminated its jurisdiction in 1984, then after West Virginia declined to reassert jurisdiction in its January 3, 1992, meeting with OSM, OSM's action of issuing the cessation order was OSM's determination under 30 CFR 700.11(d)(2) that West Virginia acted arbitrarily in failing to reassert jurisdiction because the State's 1984 determination was based on a misrepresentation of material fact. The preamble states that the "standard adopted [in § 700.11(d)(2)], bond release or written determination based upon misrepresentation of a material fact, can be established by objective evidence relating to whether the reclamation plan [or 30 CFR Chapter VII Subchapter B] was fully complied with and completed at the time of bond release." 53 FR 44362 (Nov. 2, 1988). The record in this case contains ample evidence that the requirements of 30 CFR Subchapter B were not met in 1984 and that both West Virginia and OSM were well aware of that fact.

In my view, the majority has thwarted the Secretary's intent in adopting 30 CFR 700.11(d)(1) and reneged on his representation to the U.S. Court of Appeals on how 30 CFR 700.11(d)(2) would be interpreted and 30 U.S.C. § 1269(c)(3) (1994) would be implemented.

I dissent.

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Will A. Irwin
Administrative Judge